No. 01-232

Supreme Court, U.S.
FILED

In The

SUPREME COURT OF THE UNITED STATES

Lesley Wooldridge

Petitioner,

versus

HAMILTON COUNTY, OHIO
DEPARTMENT OF HUMAN SERVICES,

Respondents.

On Petition For A Writ Of Certiorari
To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUMMARY OF ARGUMENT

The decision below was in accordance with Ohio law and applicable federal law regarding the termination of parental rights in cases of dependency, neglect, and abuse. There is no question of law at issue that justifies the grant of writ of certiorari here.

ARGUMENT

The Supreme Court of Ohio was procedurally correct when it dismissed Petitioner's notice of appeal.

On March 6, 2001, the Supreme Court of Ohio dismissed a notice of appeal by Petitioner pursuant to that court's Prac. R. II, Sec. 2(A)(1)(a), which provides:

> Section 2. Institution of Appeal from Court of Appeals.
>
> (A) Perfection of Appeal.
>
> (1)(a) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case (which is addressed in S. Ct. Prac. R. IV), the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the

> judgment being appealed. If the appeal involves termination of parental rights or adoption of a minor child, or both, the appellant shall file the notice of appeal in the Supreme Court within 20 days from the entry of the judgment being appealed. ...

The court's Prac. R. II, Sec. 2(A)(1)(b) provides:

> b) Except as provided in divisions (A)(2), (3), and (4) of this section, the time designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. ...

On December 20, 2000, the Court of Appeals for the First Appellate District, Hamilton County, Ohio, affirmed the trial court's decision in this case. Petitioner filed her notice of appeal on February 5, 2001. To comply with Prac. R. II, Sec. 2(A)(1)(a), Petitioner needed to file her notice of appeal by January 9, 2001. Petitioner's explanation for failing to comply with Prac. R. II, Sec.

2(A)(1)(a) is that a letter from previous counsel, dated December 21, 2000, incorrectly stated she had forty-five days to appeal. Petitioner fails to indicate how this mistake prejudiced her except to imply that she waited too long to obtain counsel and discover the error.

Additionally, the Supreme Court of Ohio dismissed Petitioner's notice of appeal pursuant to that court's Prac. R. II, Sec. 2(B)(1)(d), which provides:

> B) Contents of Notice of Appeal.
>
> (1) The notice of appeal shall state ...
>
> (d) That one or more of the following are applicable:
>
> (i) The case involves affirmance of the death penalty;
>
> (ii) The case originated in the court of appeals;
>
> (iii) The case raises a substantial constitutional question;
>
> (iv) The case involves a felony;
>
> (v) The case is one of public or great general interest;

> (vi) The case involves termination of parental rights or adoption of a minor child, or both; ...

Petitioner's notice of appeal failed to state that the case involved the termination of parental rights and stated only that the case raised a substantial constitutional question and was one of public or great general interest. Petitioner's failure to comply with Prac. R. II, Sec. 2(B)(1)(d) was unrelated to any purported ineffective assistance of counsel raised in this Petition. The responsibility for complying with Prac. R. II, Sec. 2(B)(1)(d) rested upon current counsel.

Petitioner essentially argues that, upon objection, a trial court cannot - except for procedural error, perhaps - reject a magistrate's decision in a case involving the termination of parental rights if the magistrate decides against termination. However, OH Juv. R. 40(E)(4)(b) provides:

> (b) Disposition of objections. The court shall rule on any objections. The court may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with

instructions, or hear the matter itself. ...

The Respondent and Guardian Ad Litem filed objections to the magistrate's decision in the case involving Petitioner's children. After reviewing the transcript of the hearings before the magistrate, the trial court rejected the magistrate's decision and awarded permanent custody of the children to the Hamilton County Department of Human Services, thereby terminating parental rights.

PETITIONER'S AUTHORITIES DISTINGUISHED

To challenge OH Juv. R. 40(E)(4)(b), Petitioner makes the novel argument that double jeopardy considerations should apply in cases of dependency, neglect, and abuse.

Petitioner cites *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), regarding the fundamental nature of parental rights. However, this Court in *Santosky* noted that "natural parents have no 'double jeopardy' defense against repeated state termination efforts." *Santosky*, at 764, 1400, 613.

Petitioner indicates that the holding in *Swisher v. Brady*, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978), should apply in the current case. Although *Swisher* did address double jeopardy

considerations, it was a case involving Maryland's delinquency system, not cases of dependency, neglect, and abuse. Moreover, *Swisher* held that, even in delinquency cases, trial courts can reject the decisions of magistrates and make "supplemental findings" under statutory schemes that forbid the introduction of any new evidence. *Swisher*, at 219, 2708, 717. Similarly, the trial court in the current case did not hear any new evidence but, instead, reviewed the transcript and rejected the magistrate's decision.

To support the application of double jeopardy in cases of dependency, neglect, and abuse, Petitioner states that *State v. Brown*, 91 Ohio App. 3d 427; 632 N.E.2d 970 (1993), recognized "Miranda" rights in such cases. In fact, *Brown* was a criminal case involving the suppression of evidence.

Petitioner raises ineffective assistance of counsel not only as an explanation for her failure to comply with Prac. R. II, Sec. 2(A)(1)(a), but also as an issue affecting the entire case. Petitioner's ineffective assistance argument again focuses on double jeopardy and previous counsel's failure to raise it. However, to establish ineffective assistance, a defendant must "...show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." *Strickland v. Washington* 466 U.S. 668, 694; 104 S. Ct. 2052, 2068; 80 L. Ed. 2d 674, 698 (1984). One can hardly fault previous counsel's failure to raise a novel argument such as the application of double jeopardy in cases of dependency, neglect, and abuse.

Petitioner lists a series of issues including purported violations of the Fourth, Fifth, and Fourteenth Amendments but fails to offer any detail regarding how such rights apply in this case. Petitioner's comments along these lines are meritless.

Finally, Petitioner asks the court to consider the "Ohio Adoption and Safe Families Act". Petitioner apparently refers to recent amendments to O.R.C. 2151.414(D) and (E). The trial court clearly stated, however, that it applied the statutory law as it existed prior to amendment.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain her burden of establishing under this Court's Rule 10 there are special and important reasons why the writ should be granted. The decisions below satisfied all applicable state and

federal law.

Respectfully submitted,

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ProKids, Inc. is a nonprofit corporation existing under the laws of Ohio.